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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 442

VOLKSWAGEN INTERAMERICANA S.A.,
Petitioner,

v.

HENRY A. ROHLSEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

Volkswagen Interamericana, S.A., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on May 17, 1966.

Citations to Opinions Below

Trial was had in the United States District Court for the District of Puerto Rico before a jury, and the judgment therein was entered on July 15, 1965. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* is reported at 360 F.2d 437 (1st Cir. 1966).

Jurisdiction

The judgment of the Court of Appeals was entered on May 17, 1966, and is printed in Appendix C hereto, *infra.* No motion for rehearing was made. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether an independently owned and managed automobile distributor, whose sole connection with the manufacture or assembly of automobiles is its "standard" franchise agreement with a foreign manufacturer, may be held subject to suit under the Automobile Dealers' Day in Court Act, 70 Stat. 1125, 15 U.S.C. §1221 *et seq.*, as a "manufacturer", on the grounds that it "acts for and is under the control of" that manufacturer, without any showing of control or agency other than the provisions of the franchise agreement.

2. Whether, in a suit under the Automobile Dealers' Act, the Court of Appeals properly interpreted the statutory terms "coercion" and "in good faith", 15 U.S.C. §1222.

3. Whether the Automobile Dealers' Act, as applied to this case, violates the fifth amendment to the United States Constitution, in that it is so vaguely worded as to deprive defendant of due process, and in that it is arbitrary class legislation unrelated to any requirement of the public interest.

4. Whether, in a suit under the Automobile Dealers' Act, a dealer who has failed to present any legally sufficient evidence as to what, if any, damages were suffered, is entitled to an opportunity to retry the damage issue in a new trial, or whether the Court of Appeals should have directed that judgment be entered for the defendant.

5. Whether, in a suit under the Automobile Dealers' Act, in personam jurisdiction may be asserted over defendant distributor (a Mexican corporation) by means of service of process on the manager of a separate Volkswagen dealership in Puerto Rico, solely on the grounds

that the dealership and defendant had some common officers, and that the dealership was presumed to have entered into a standard franchise agreement with defendant, without proof of the terms thereof.

Statutory and Constitutional Provisions Involved

The statutory provisions involved are sections 1-5 of the Automobile Dealers' Day in Court Act (hereafter "Automobile Dealers' Act"), 70 Stat. 1125, 15 U.S.C. §1221-25.

The constitutional provision involved is the fifth amendment to the United States Constitution. The statutory and constitutional provisions have been reprinted in Appendix A hereto.

Statement of the Case

This was a civil action brought by Henry Rohlsen, plaintiff, against Volkswagen Interamericana, S.A., defendant (hereinafter VWI), a Mexican corporation, in the District Court for Puerto Rico. The jurisdiction of the District Court was based on the Automobile Dealers' Act, 15 U.S.C. §1221 *et seq.* Defendant, by franchise with Volkswagenwerke of Germany, the manufacturer of Volkswagen automobiles, was, and is, the exclusive Volkswagen distributor for Central America and the Caribbean. Plaintiff, under a franchise agreement with defendant, had been engaged in the business of selling and servicing Volkswagens in the Virgin Islands, until defendant terminated his franchise. Plaintiff's complaint alleged that defendant had failed to act in good faith in terminating plaintiff's dealer franchise, thereby violating the statutory duty imposed upon manufacturers by the Automobile Dealers' Act. Service of

process was made in Puerto Rico on one Baldur Kleine, the then manager of Volkswagen de Puerto Rico, a Puerto Rico corporation (hereinafter VWPR) engaged in the business of selling Volkswagens in San Juan, Puerto Rico, under a franchise agreement with defendant.

This action was begun in May of 1963. Defendant thereafter moved to dismiss on the ground that the court lacked jurisdiction over the subject matter, and over the person of the defendant (App. 21-26).* This motion was denied on July 29, 1963 (App. 29-30) and a motion for reconsideration was denied on August 16, 1963 (App. 47).

The case was tried from July 6 through July 15 and the jury returned a verdict for plaintiff in the amount of $300,000 plus costs (App. 81, 1083-84). Defendant had moved at the close of plaintiff's case and at the close of the entire case for a directed verdict, but both motions were denied (App. 742, 1000). Judgment was entered on the jury verdict on July 15, 1965 (App. 82), and a timely motion for a new trial or judgment n.o.v. was made by defendant (App. 83-85) and denied by the court on August 26, 1965 (App. 87).

Defendant thereafter took an appeal to the Court of Appeals for the First Circuit. On May 17, 1966, the Court of Appeals issued an opinion which sustained the jury verdict below on the issue of liability, finding, *inter alia,* that defendant VWI was doing business in, and therefore subject to personal jurisdiction in, Puerto Rico, and was properly served by service upon VWPR's managing agent; that defendant was an "automobile manufacturer" within the meaning of the Act; that a jury could have found that defendant's termination of the

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* References in the form "App. . . ." are to page numbers of the Defendant-Appellant's printed Appendix in the Court of Appeals, nine copies of which have been filed in this Court.

franchise was not "in good faith"; and that the Act was constitutional. The court, however, set aside the jury's finding as to damages as being based on improper and insufficient evidence, and on a charge erroneous in several important particulars. The judgment of the Court of Appeals ordered the judgment below vacated, and remanded the case for a partial new trial on the issue of damages alone. It is of this order that petitioner seeks review.

Reasons for Granting the Writ

The decision of the Court of Appeals below in the instant case presents novel and substantial questions concerning the constitutionality and interpretation of the Automobile Dealers' Act, which has never been construed by this Court although it has been the subject of numerous suits in the lower federal courts.[1] The decision also

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1. Thus actions based on this statute have been before the federal courts in the following cases:

Circuit Courts:

SECOND CIRCUIT: *Pierce Ford Sales, Inc.* v. *Ford Motor Co.*, 299 F.2d 425 (2d Cir. 1962), *cert. denied*, 371 U.S. 829; THIRD CIRCUIT: *Globe Motors, Inc.* v. *Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); *Milos* v. *Ford Motor Co.*, 317 F.2d 712 (3d Cir. 1963), *cert. denied*, 375 U.S. 896; *Garvin* v. *American Motors Sales Corp.*, 202 F.Supp. 667 (W.D. Penn. 1962), *rev'd*, 318 F.2d 518 (3d Cir. 1963); FIFTH CIRCUIT: *Abbott-Stansell Motor Co.* v. *Chrysler Motors Corp.*, 333 F.2d 322 (5th Cir. 1964); *Woodard* v. *General Motors Corp.*, 298 F.2d 121 (5th Cir. 1962), *cert. denied*, 369 U.S. 887; SEVENTH CIRCUIT: *Kavanaugh* v. *Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965); EIGHTH CIRCUIT: *Kotula* v. *Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *Fiat Motor Co.* v. *Alabama Imported Cars, Inc.*, 292 F.2d 745 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 898.

District Courts:

Walker v. *Ford Motor Co.*, 241 F.Supp. 526 (E.D. Tenn. 1965); *Snyder* v. *Eastern Auto Distributors, Inc.*, 239 F.Supp. 240 (W.D.S.C. 1965); *General Motors Corp.* v. *The Mac Co.*,

resolves an important question of federal procedure with respect to proof of damages, in a manner which is in sharp conflict with the decisions of other Courts of Appeals. Finally, the decision establishes an erroneous principle, with a far-reaching impact, with respect to the acquisition of in personam jurisdiction.

1. The Court of Appeals Improperly Held Defendant, an Independently Owned and Managed Distributor, To Be Subject to Suit as a Manufacturer.

The instant case raises, for the first time, the novel and important question whether an independent automobile distributor can be sued under the Automobile Dealers' Act. The Court of Appeals held that suit might be maintained against defendant here because the court concluded that defendant was encompassed within the definition of an "automobile manufacturer" contained in 15 U.S.C. §1221(a), which provides:

> "(a) The term 'automobile manufacturer' shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, *including any person, partnership, or corporation which acts for*

247 F.Supp. 723 (D. Colo. 1965); *Buono Sales, Inc.* v. *Chrysler Motors Corp.*, 239 F.Supp. 839 (D.N.J. 1965); *Zarbock* v. *Chrysler Corp.*, 235 F.Supp. 130 (D. Colo. 1964); *Augusta Rambler Sales, Inc.* v. *American Motors Sales Corp.*, 213 F.Supp. 889 (N.D. Ga. 1963); *Sam Goldfarb Plymouth, Inc.* v. *Chrysler Corp.*, 214 F.Supp. 600 (E.D. Mich. 1962); *Blenke Bros. Co.* v. *Ford Motor Co.*, 203 F.Supp. 670 (N.D. Ind. 1962); *Bergen Rambler, Inc.* v. *American Motor Sales Corp.*, 30 F.R.D. 334 (D.N.J. 1962); *Schnabel* v. *Volkswagen of America, Inc.*, 185 F.Supp. 122 (N.D. Iowa 1960); *Reliable Volkswagen Sales & Service Co.* v. *World-Wide Auto Corp.*, 182 F.Supp. 412 (D.N.J. 1960); *Leach* v. *Ford Motor Co.*, 189 F.Supp. 349 (N.D. Cal. 1960); *Staten Island Motors, Inc.* v. *American Motor Sales Corp.*, 169 F.Supp. 378 (D.N.J. 1959); *Pinney & Topliff* v. *Chrysler Corp.*, 176 F.Supp. 801 (S.D. Cal. 1959); *Barney Motor Sales* v. *Cal Sales, Inc.*, 178 F.Supp. 172 (S.D. Cal. 1959).

and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." (Emphasis supplied.)

The original Senate and House bills defined "automobile maufacturer" specifically to include distributors. S. 3879, H.R. 11360, 84th Cong., 2d Sess. Senator O'Mahoney, the sponsor of the bill in the Senate, pointed out that the reason for this broad definition was to "forestall the manufacturer from escaping the consequences of this bill by establishing a sales corporation which would enter into franchise agreements with dealers." *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* on H.R. 11360 and S. 3879, 84th Cong., 2d Sess., p. 27 (1956). Congress was concerned with the undue power wielded in the American economy by the "Big Three" manufacturers, and not with the numerically inconsequential distributors dealing with low-volume lines and with foreign cars, *Hearings, supra,* p. 152. It is evident throughout the legislative history that the whole purpose of this definitional section was to make the manufacturer itself responsible for coercion effected by some agent or other person under the control of the manufacturer, and not to impose liability on the agent or distributor.

This provision was amended, and the present language adopted, because it was felt that the original language might make automobile manufacturers subject to liability for the acts of persons, *i.e.,* distributors, over whom the manufacturer had no control. *Hearings, supra,* at p. 133. Again, it should be noted that the Committee interpreted its own language under the original definition to mean, not that *distributors* would be sued, but rather that the *manufacturer* would be sued, *for acts of the distributor,*

which he was helpless to control. Thus, under the Act as finally passed, it is clear that the manufacturer cannot escape liability by transacting business with its dealers through distributors which are under its direct control; there is no suggestion in the legislative history that Congress intended to subject distributors themselves to suit. Had Congress intended such a result, it could have used clear and precise language, of the kind which is used in similar state statutes. See, *e.g.*, LA. STAT. ANN. Tit. 32:1254(A)(4)(C); MINN. STAT. ANN. §168.27(14)(3) (1960); and OKLA. STAT. ANN. Tit. 47, §562(g), 565(j)(3) (1962).

Even assuming *arguendo*, that Congress intended that a distributor could be subject to suit directly if it "acts for and is under the control of" a manufacturer, the First Circuit below erred in sustaining the jury's finding that defendant here acted for and was under the control of Volkswagenwerke. The court sustained that finding solely on the basis of a "standard" automobile franchise agreement between defendant and the manufacturer, without any showing of common ownership or interlocking officers, or any showing that the manufacturer actually exercised any control over defendant, or that defendant acted "for" the manufacturer, rather than on its own behalf.

Virtually all automobile distributors have franchise agreements of one kind or another with a manufacturer. Thus, all such distributors are now subject to suit, under the ruling of the First Circuit, merely because they are distributors, and without regard to whether they fit the test set by Congress, of acting "for", *and* being "under the control of", a manufacturer. Such an interpretation is tantamount to placing the term "automobile distributor" back in the provision from which Congress deleted it.

2. The Court of Appeals Misconstrued the Requirement of "Good Faith" as Defined in the Act.

In the instant case the First Circuit affirmed the jury's finding that defendant did not act in "good faith" within the meaning of the Act. This affirmance marks the first instance known to counsel in which a jury finding of lack of good faith, in a suit based on this statute, has been affirmed by any Court of Appeals: see, *e.g., Globe Motors, Inc.* v. *Studebaker-Packard Corp.,* 328 F.2d 645 (3d Cir. 1964); *Pierce Ford Sales, Inc.* v. *Ford Motor Co.,* 299 F.2d 425 (2d Cir. 1962), *cert. denied,* 371 U. S. 829. In the instant case, the First Circuit admitted that the evidence showed that defendant had a legitimate reason for cancelling plaintiff's franchise, and that, although taking the evidence most favorable to plaintiff, the jury could have found plaintiff's performance was satisfactory, it was also true that:

> "The jury could have found, as defendant contended, that defendant's reason for terminating the franchise was that plaintiff failed to meet defendant's standards of service, sales, efficiency, and appearance. * * * *However, plaintiff's own evidence and admissions disclose that his performance could well have been better, and that it would not have been unreasonable for the manufacturer to conclude that,* even if plaintiff's enterprise was not below par for the Virgin Islands, *another, more enterprising dealer could* overcome many of the difficulties encountered by the plaintiff, and *better represent Volkswagen's interests in terms of service, sales and image.*" (Emphasis supplied.) (App. B, pp. 9b-10b).

Despite this concession, the court held that there was some evidence from which the jury could have inferred ill-will on the part of defendant toward plaintiff, and therefore concluded that "there was a jury question

whether defendant's termination of the franchise related to the conduct of plaintiff's agency, or to his rejection of the defendant as a partner upon unreasonable terms." (App. B, p. 13b).

The nature of the evidence involved on this point was as follows. Defendant's president, Mr. Hinke, wrote to plaintiff in November of 1960, suggesting that plaintiff's operation was unsatisfactory, and suggesting further that his problems might be solved either by hiring an experienced manager, or by forming a partnership with one Tranum, an experienced dealer who could provide additional capital (App. 161-63). Nothing came of this suggestion, and in January of 1961, Mr. Hinke again suggested that plaintiff enter a partnership agreement with defendant and with certain other investors, whom defendant had lined up (App. 402-03, 610-12, 629-32, 796). A few weeks later, at the end of February, 1961, Hinke suggested a similar proposal (App. 656-59, 800); plaintiff rejected this suggestion, as he had the previous one. This was the only evidence, relating to defendant's actions vis-a-vis plaintiff, upon which the jury could have based a finding of "bad faith". Even the Court of Appeals admitted that each act of defendant cited by plaintiff as an example of coercion was wholly consistent with a good-faith attempt by defendant to improve plaintiff's sub-standard operation. App. B, pp. 9b-10b.

This was the last time defendant made such a proposal to plaintiff. However, it was not until September 24, 1962, more than *one and one-half years* after plaintiff had rejected defendant's proposal, that defendant terminated the franchise. There was undisputed evidence that throughout that lengthy period, defendant made extensive efforts to assist plaintiff in improving his operation, principally by requesting its dealer in Puerto Rico to loan experienced personnel, both managerial and technical, to

plaintiff on a temporary basis in order to resuscitate plaintiff's dealership (App. 412, 810-11, 412-14). Further, as the Court of Appeals admitted, there was ample evidence that throughout the dealings between the parties, plaintiff's operation was so far below standard as to justify summary cancellation. See p. 9, *supra*.

The Automobile Dealers' Act prohibits only conduct evidencing lack of good faith "* * * in terminating, cancelling, or not renewing the franchise * * *." Consequently, in reaching a verdict for plaintiff the jury must have found (1) defendant's conduct constituted a "lack of good faith", *and* (2) plaintiff's franchise was terminated as a consequence of such conduct. It is clear that there is nothing in the above facts to justify a jury finding that the termination of plaintiff's franchise was because of plaintiff's rejection of defendant as a partner on unreasonable terms, *cf. Kotula* v. *Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U. S. 979 (1965). Not only does the extended time lapse undercut a finding of the existence of a cause and effect relationship between the negotiations concerning reorganization of plaintiff's business and the final termination, *cf. Leach* v. *Ford Motor Co.*, 189 F.Supp. 349 (N.D. Cal. 1960); equally damaging is the fact that plaintiff's franchise was subsequently taken over by Tropical Motors, a company in which defendant had no financial interest whatsoever (App. 806-07).

Even if one were to assume, as did the Court of Appeals, that a "jury could well find that the *initially* threatened termination was not in good faith," App. B, p. 13b (emphasis supplied), it is evident that the record is insufficient to support a finding that plaintiff's rejection of this *"initial"* threat, as opposed to defendant's legitimate need and desire to gain adequate representation in St. Croix, was in fact the cause of defendant's subsequent cancellation of plaintiff's franchise.

The highly tenuous grounds upon which a finding of "lack of good faith" was based in the instant case, the fact that this is the first Court of Appeals decision in which such a finding was sustained, and the fact that, as the court conceded, defendant's conduct in this case was entirely consistent with a good faith termination based on legitimate business needs, all emphasize the importance of a review by this Court. Many decisions have arisen under the Act and many are pending. Some guidance is urgently needed by the federal courts as to the range and scope of the conduct which this Act prohibits.

3. The Automobile Dealers' Act Is Unconstitutional.

The constitutionality of the Automobile Dealers' Act has been in question since even before its enactment. During the debates which took place on the floor of the House, several Congressmen criticized the bill on constitutional grounds. See, *e.g.*, Remarks of Representative Wolcott of Michigan and Representative Scott of Pennsylvania (102 Cong. Rec. 12834-35, Daily ed. July 23, 1956). President Eisenhower, in signing the bill, also expressed reservations as to its constitutionality. U. S. Code Cong. & Adm. News, 84th Cong., 2d Sess. 4841-42 (1956).

The constitutionality of the Act has been questioned by legal commentators, see, *e.g.*, Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 Colum. L. Rev. 219, 228 (1957), as well as litigants, see, *e.g.*, *Woodard* v. *General Motors Corp.*, 298 F.2d 121 (5th Cir. 1962), *cert. denied*, 369 U. S. 887, *reh. denied*, 370 U. S. 965; *Globe Motors, Inc.* v. *Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); *Pinney & Topliff* v. *Chrysler Corp.*, 176 F.Supp. 801, 810 (S.D. Cal. 1959). In one case, the constitutionality of the Act was sustained, *Blenke Bros.* v.

Ford Motor Co., 203 F.Supp. 670 (N.D. Ind. 1962), but no appeal was taken from that decision. In the other cases in which the constitutional issue was raised, the courts have not reached the question. In the *Woodard* case, *supra*, the court observed that defendant had raised "serious questions" as to the statute's constitutionality, but did not have to decide them.

The first constitutional difficulty with the statute is that "* * * the 'good faith' test of the federal act is far from clear, and the statutory definition of the term hinders rather than helps", Brown & Conwill, *op. cit. supra*, at 231.

The term "good faith" as used in this statute bears no resemblance to the term familiar in the common law. Congress sought to define "good faith" in an artificial manner, to mean "the duty of each party to a franchise * * * to act in a fair and equitable manner * * * so as to guarantee the one party freedom from coercion, intimidation or [threats thereof]", 15 U.S.C. §1221(e). It is because of this unintelligible standard of conduct that defendant contends the statute is unconstitutionally vague. Other statutes have used the term "good faith", see, *e.g.*, the UNIFORM COMMERCIAL CODE §1-201(19); but when employed there, the term has a known content derived from decades of commercial litigation. That is not the case with this "definition". By the terms of the statute, the manufacturer, while prohibited from coercing or intimidating, is expressly permitted to recommend, endorse, exposit, persuade, urge and argue. 15 U.S.C. §1221(e). Any franchise arrangement, by its very nature, contains a continuing potential for disputes as to whether the dealer's performance meets the manufacturer's standards of adequate representation; yet this statute imposes a duty on manufacturers to continually determine, at their peril, the precise point at which urging or argument becomes intimidation or coercion.

Since, when presented with this vague and shifting standard, "men of common intelligence must necessarily guess at [the] meaning" of the phrase by which they are told to guide their daily business activities, the Automobile Dealers' Act is unconstitutionally vague. The record in this case, and the $300,000 verdict rendered by the jury, are a pointed example of the danger of guessing wrong. See *Bouie* v. *City of Columbia*, 378 U. S. 347, 351 (1964); see also *General Motors Corp.* v. *Blevins*, 144 F.Supp. 381 (D. Colo. 1956), where the court struck down a comparable state statute because of its vagueness.

The second constitutional infirmity of the Act is that it denies due process by drawing arbitrary distinctions, unrelated to any requirement of the public interest. As has been observed, while it is clear that the statute is designed to give automobile dealers an advantage in their dealings with manufacturers, "the problem is to spell out some benefit or protection to the general public", Brown & Conwill, *op. cit. supra* at 233. Congress did not legislate a requirement of good faith into interstate commerce generally, or into all contractual relationships between large manufacturers and small dealers; although certainly such relationships are not confined to the automobile industry. Indeed, an analysis of the legislative history of the Act reveals Congress' recognition that the bill did not serve a public purpose generally, but was rather designed, quite specifically, as an aid to automobile dealers who were recognized as the only beneficiaries of this new cause of action. See, *e.g.*, *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong. 2d Sess. 23 (1956).

It is submitted that this special-interest legislation which subjects all automobile manufacturers to novel,

vague and arbitrary liabilities, is unreasonable class legislation and violates the due process clause of the fifth amendment.

4. The Court of Appeals Erred in Not Entering Judgment for Defendant, Since Plaintiff Failed To Present Any Legally Sufficient Evidence of His Alleged Damages.

This case presents two important questions of federal practice with respect to proof of damages, which should be settled by this Court. On both points, the decision of the Court of Appeals is in direct conflict with cases in other circuits, and with rulings approved by this Court. The first question is whether the kind of evidence offered here was competent or sufficient, as a matter of law, to sustain any verdict; defendant contends that it was not. The second question is whether, granted that plaintiff offered no such evidence, he is nevertheless entitled to litigate the issue a second time in a partial new trial; defendant contends that the Court of Appeals acted improperly in not granting judgment for defendant, under Rule 50(b) of the Federal Rules.

Plaintiff here claims that, by reason of defendant's terminating his franchise, he was damaged, and sues to recover "the damages by him sustained", 15 U.S.C. §1222. It is a clear and well-settled rule of law that a plaintiff has the burden of proof as to his damages and that if he fails to prove his damages with reasonable certainty, he has failed to prove his case. McCormick, Damages §14 at 53 (1935); *Peters* v. *Lines*, 275 F.2d 919, 929-31 (9th Cir. 1960); *Association of Western Railroads* v. *Riss & Co.*, 299 F.2d 133, 135 (D.C. Cir. 1962).

It has been equally well-settled, in several decisions from other circuits that, in proving the lost profits, or the

value, of a business enterprise, something more is needed to sustain a recovery than the unsupported estimates and guesses of the proprietor. Verdicts based only on such self-serving and inherently unreliable "evidence" have been repeatedly condemned as the product of speculation and conjecture: "something better is required to sustain a jury verdict than a mere interested guess", *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U. S. 835; *United States* v. *Griffith, Gornall & Carman, Inc.*, 210 F.2d 11 (10th Cir. 1954); *Emich Motors Corp.* v. *General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U. S. 558 (1951); see also *Siegfried* v. *Kansas City Star Co.*, 298 F.2d 1 (8th Cir. 1962), *cert. denied*, 369 U. S. 819, *aff'g* 193 F. Supp. 427 (W.D. Mo. 1961), wherein the court had stated that "Figures, without supporting data therefor, are not substantial evidence in this, or any other, action at law", 193 F. Supp. at 437. It has been held that where plaintiff sought to recover lost profits, but failed to show what his expenses were, defendant was entitled to a directed verdict. *Transit Bus Sales* v. *Kalamazoo Coaches, Inc.*, 145 F.2d 804 (6th Cir. 1944).

During the trial, plaintiff offered a variety of testimony, unsupported by the introduction of any of his business records (or, indeed, by any factual data), to prove various elements of damage. Thus, as to his lost profits, plaintiff testified that he had ordered 117 automobiles which defendant failed to deliver, and claimed a net profit of $500 per automobile, the equivalent of his gross mark-up (App. 489-90). The Court of Appeals pointed out the court's error "in permitting the jury to find that * * * his profit on all 117 would have been the same as the gross mark-up. Manifestly there would have been some expense,

even if all had ultimately been sold," (App. B, p. 16b). Since the only "evidence" offered at the trial as to any supposed lost profits was held to be insufficient, it is clear that no item for these "lost profits" might properly be included in a verdict.

Plaintiff also testified that, *in his opinion,* his franchise was worth $200,000 (App. 498); he did not attempt to explain the basis for this figure, or introduce any data from his records to support it. As to this, the Court of Appeals stated that "We think the court was exceptionally liberal in permitting the plaintiff to testify to figures concerning his profits and the value of the franchise *off the top of his head, without reference to books and records* (Emphasis supplied.)", (App. B, p. 16b-17b). The authorities cited above make it clear that such opinion testimony is legally insufficient to prove the earnings of a business, and that reception of it was not "liberal", but clear error. The opinion of the Court of Appeals does not reveal any reason for failing to so hold.

Despite its apparent recognition that such testimony was valueless, the Court of Appeals intimated that it might support a verdict if not rebutted. Thus, the court said: "Possibly the defendant's only remedy was cross-examination. Possibly, too, before another trial, the defendant will want to take plaintiff's deposition in St. Croix where the records are", (App. B, p. 17b).[3] This in effect forces defendant, at its peril, to "rebut" evidence which has been repeatedly held in the federal courts and indeed, in courts generally, to be of *no* probative weight; and which a leading authority suggests should not be even

3. The defendant had cross-examined the plaintiff on this point (App. 698), and the plaintiff's deposition had been taken (App. 600).

admissible, McCormick, Damages §29 at 107-109 (1935); *cf.* 5 Corbin, Contracts §1021 at 134, §1023 at 147 (1964 ed). In effect, this gives defendant the burden of proof on the crucial issue of whether plaintiff suffered damages, and, if so, in what amount.

The only other items of damage which plaintiff claimed, were items which the Court of Appeals correctly held not to be recoverable. Throughout the trial, plaintiff testified to having suffered "losses" on various items which he had been required to handle in previous years, such as a line of Vespa Scooters (App. 502, 505), and a Porsche tractor (App. 502). He also testified to having been "forced" to buy other items for his own use, such as 100 promotional cigarette lighters (App. 503-04), some Volkswagen signs for display (App. 503, 506), a "Kardex" Filing System for keeping track of inventory (App. 544), and a certain welding machine (App. 500). The Court of Appeals held that none of these items were recoverable for various reasons, App. B, p. 9b, n. 4. Plaintiff also testified as to various losses on unrelated transactions (App. 390, 392, 497), which he made no attempt to justify as recoverable damages on appeal; hence the Court of Appeals made no reference to them.

Plaintiff further sought to recover for a claimed loss of $13,000 on his inventory of spare parts (App. 499, 712), allegedly rendered useless when defendant cancelled. This element of claimed damages suffers from the same defect as all his others, *i.e.*, that there was no proof of the fact beyond plaintiff's unsupported assertion; but in addition, plaintiff refused to respond to a letter in which defendant offered to take them off his hands. The Court of Appeals indicated that such refusal to mitigate his damages would render recovery for this sum inappropriate, App. B, p. 16b. *Cf. Chrysler Motors Corp.* v. *Quimby*,

1 Storey 264, 144 A.2d 123, 122-23, *op. adhered to*, 144 A.2d 885 (Del. 1958).

The only other "element" which could sustain any verdict for plaintiff in this case was the claimed injury to his reputation (App. 496, 1062); but the Court of Appeals correctly held it had been error to allow the jury to assess damages for this alleged injury, App. B, p. 17b.

The foregoing summary of the items of damages claimed by plaintiff shows that there is no single item on which any evidence was presented sufficient in law to support a verdict. Since the Court of Appeals failed to indicate that any of plaintiff's proof on this issue was legally sufficient to sustain a verdict, and since proof of "the damages by him sustained" was crucial to any recovery by plaintiff, *cf. Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 802 (1st Cir. 1964), it is clear that defendant was entitled to judgment as a matter of law.

It is axiomatic that, as stated in 6 MOORE'S FEDERAL PRACTICE ¶56.04 [2] (2d ed. 1965),

> "* * * the plaintiff has the burden of, and must take the initiative in, establishing the prima facie elements of his claim; and, if he does not, the defendant is entitled to a directed verdict." (*id.* at 2066).

Defendant had saved its rights in this regard by timely motions for a directed verdict (App. 742, 1000), and for judgment n.o.v. under Rule 50(b) (App. 83-85). Hence, under the decisions of this Court, the Court of Appeals had power to enter judgment for defendant, *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); 5 MOORE'S FEDERAL PRACTICE, ¶50.10, 50.11 (2d ed. 1964), and indeed, a duty to do so. 6 MOORE'S FEDERAL PRACTICE ¶59.08 [5] at 3815 (2d ed. 1965).

Despite these facts, the Court of Appeals remanded, to allow plaintiff to litigate the question of damages a second time. This decision is directly in conflict with the many cases holding that plaintiff's failure to prove damages entitles defendant to judgment, *e.g., Siegfried v. Kansas City Star Co.*, 298 F.2d 1 (8th Cir. 1962), *cert. denied*, 369 U. S. 819. Indeed, in awarding plaintiff a second chance in these circumstances, the Court of Appeals went beyond its authority to order a new trial, Fed. R. Civ. Proc. Rule 59(a). That rule provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law". It has never been thought that mere failure by the plaintiff to prove his case entitles him to another chance, through a new trial, absent some special circumstances not present here, 6 MOORE'S FEDERAL PRACTICE ¶59.08 [5] (2d ed. 1965). The decision below is thus in conflict not only with the normal rule followed in the other circuits, but with the Federal Rules of Civil Procedure.

5. The Court of Appeals Improperly Sustained the District Court's Jurisdiction Over Defendant.

The Court of Appeals held that defendant, a Mexican corporation, was amenable to suit in Puerto Rico solely by virtue of the fact that one of defendant's dealers (VWPR), which had some officers in common with defendant, was located in Puerto Rico, and that there was a presumed franchise agreement between this dealer and defendant.

This Court has already held that the existence of common directors or officers is not of itself sufficient grounds to subject a foreign corporation to local jurisdiction.

Cannon Mfg. Co. v. *Cudahy Packing Co.*, 267 U. S. 333 (1925). The question presented is, therefore, whether the additional fact that VWPR was defendant's "dealer" provides a sufficient jurisdictional nexus. Although the supposed[2] franchise agreement was never introduced into evidence, the First Circuit felt free to "infer" that it existed, and to "infer" that it was a "standard" automobile dealer's franchise, and substantially identical to that formerly extant between VWI and plaintiff. App. B, p. 3b. Thus, the implication of this decision is that jurisdiction over automobile manufacturers may be obtained in any state in which said manufacturer has a franchised dealer, without proving the actual terms of the agreement between the manufacturer and the dealer upon which service is made.

There can be no reason to limit this rule to the automobile industry. Since manufacturers and distributors in many fields operate through franchising arrangements similar to those in question here, all of these may now be subject to suit in any state where a franchised dealer is located. Such a result appears to be a substantial departure from the due process standards enunciated by this Court in *International Shoe Co.* v. *State of Washington*, 326 U. S. 310 (1945), and by the Fifth Circuit in *Lone Star Package Car Co., Inc.* v. *Baltimore & O. R. R.*, 212 F.2d 147 (5th Cir. 1954).

Service of process upon a dealer has been held in some cases to subject the distributor or manufacturer to suit, but in each case, the court emphasized that a very high degree of actual, effective, working control exercised over the served dealer had been shown, see, *e.g.*, *Sohnabel* v.

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2. This franchise agreement had never been introduced into evidence. In fact, there was no proof that a written franchise agreement had been in existence between VWI and VWPR.

Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960); *Fiat Motor Co.* v. *Alabama Imported Cars, Inc.*, 292 F.2d 745 (D.C. Cir. 1961), *cert. denied*, 368 U. S. 898. No other circuit court has gone so far as to assert jurisdiction on the basis of a contract, both the terms and the existence of which were never proven, but merely presumed to exist.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND L. FALLS, JR.

Raymond L. Falls, Jr.,
Counsel for Petitioner.

APPENDIX A

STATUTE INVOLVED: 15 U.S.C. §§1221-25

15 U.S.C. §1221. Definitions.

As used in this chapter—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation,

or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. (Aug. 8, 1956, ch. 1038, §1, 70 Stat. 1125.)

§1222. Authorization of suits against manufacturers; amount of recovery; defenses.

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. (Aug. 8, 1956, ch. 1038, §2, 70 Stat. 1125.)

§1223. Limitations.

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after

the cause of action shall have accrued. (Aug. 8, 1956, ch. 1038, §3, 70 Stat. 1125.)

§1224. Antitrust laws as affected.

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. (Aug. 8, 1956, ch. 1038, §4, 70 Stat. 1125.)

§1225. State laws as affected.

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled. (Aug. 8, 1956, ch. 1038, §5, 70 Stat. 1126.)

PROVISION OF THE CONSTITUTION OF THE UNITED STATES INVOLVED: AMENDMENT V

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

VOLKSWAGEN INTERAMERICANA, S.A.,
Defendant, Appellant,

v.

HENRY ROHLSEN,
Plaintiff; Appellee.

No. 6634.

United States Court of Appeals

First Circuit.

May 17, 1966.

Before ALDRICH, Chief Judge, MARIS* and COFFIN, Circuit Judges.

ALDRICH, Chief Judge.

This is an action brought under the so-called Automobile Dealers' Day in Court Act, 15 U.S.C. §§1221-1225, hereinafter Dealers' Act, by one Rohlsen, a former Volkswagen dealer in St. Croix, Virgin Islands, against the regional Volkswagen distributor, Volkswagen Interamericana, S.A., a Mexican corporation. The suit was instituted in the United States District Court for the District of Puerto Rico. Process was served on the manager of Volkswagen de Puerto Rico, hereinafter VWPR, a local dealer franchised by defendant, as defendant's alleged

* By designation.

agent. The jury returned a verdict for the plaintiff in the amount of $300,000. Defendant's appeal raises, at the outset, questions of jurisdiction.

[1] Little time need be spent over defendant's reliance upon a provision of the franchise agreement restricting actions to the courts of Mexico. We need not consider whether this provision is sufficiently reasonable that it should be respected in an ordinary suit arising out of the contract. See Wm. H. Muller & Co. *v.* Swedish American Line Ltd., 2 Cir., 1955, 224 F.2d 806, 56 A.L.R.2d 295, cert. den. 350 U. S. 903, 76 S.Ct. 182, 100 L.Ed. 793. The Dealers' Act contains its own venue provisions,[1] which are very broad, and are designed to assure the dealer as accessible a forum as is reasonably possible. Cf. Snyder *v.* Eastern Auto Distributors, Inc., 4 Cir., 1966, 357 F.2d 552, cert. den. June 13, 1966, 86 S.Ct. ——. The very purpose of the act is to give the dealer certain rights against a manufacturer independent of the terms of the agreement itself. Cf. Barney Motor Sales *v.* Cal. Sales, Inc., S.D.Cal. 1959, 178 F.Supp. 172, 175. This protection would be of little value if a manufacturer could contractually limit jurisdiction to a forum practically inaccessible to the dealer. The act cannot so easily be thwarted. Cf. Boyd *v.* Grand Trunk Western R. R., 1949, 338 U. S. 263, 70 S.Ct. 26, 94 L.Ed. 55.

Defendant further alleges that it was not present in Puerto Rico so as to be amenable to suit there, and that it was not properly served with process. If defendant is subject to jurisdiction in Puerto Rico, it is only because of defendant's relationship with its franchised Puerto

1. Suit may be brought in any district in which the defendant "resides, or is found, or has an agent." 15 U.S.C. §1222.

Rico Volkswagen dealer, VWPR, and it is to this that we turn.

It was uncontroverted that Krause, Hennings, and Reuss, the president, finance director, and managing director of defendant, were, respectively, the president, vice-president, and a director of VWPR. Hinke, a vice-president and director of VWPR, was one of defendant's two chief shareholders, the other one being Krause. From this, although the record is confused as to the actual ownership of VWPR, it could reasonably be concluded that defendant exercised direct control over the Puerto Rico dealership. We do not rest on this alone. Although VWPR's franchise agreement was not introduced into evidence, the plaintiff's was. It was a printed form, and, in the absence of contrary evidence, we think it not unreasonable to infer that it was standard, and that VWPR's agreement subjected it to no less control by defendant.[2] Under the form franchise, defendant reserved the right to control, inter alia, the dealer's automobile and spare parts inventory, its area of distribution, the number of salesmen and customers' service personnel in its employ, and even its stationery and business forms. Defendant further reserved the right to inspect, at its will, the dealer's premises and all of its business records.

[2, 3] The due process clause sets the outer limits on assertion of jurisdiction over a foreign corporation.[3] The

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2. We note that standardization of franchises is common not only within the operations of a particular manufacturer or distributor, but in the automobile industry as a whole. Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135, 1138-39 (1957).

3. Although Congress could provide for service on an American corporation anywhere in the United States, Mississippi Publishing Corp. *v.* Murphree, 1946, 326 U. S. 438, 442, 66 S.Ct. 242, 90 L.Ed. 185, it is likely that federal assertion of jurisdiction over corporations

basic standard, enunciated in International Shoe Co. *v.* State of Washington, 1945, 326 U. S. 310, 66 S.Ct. 154, 90 L.Ed. 95, and developed in subsequent decisions, is that the foreign corporation must "have certain minimum contacts with [the forum] * * * such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316, 66 S.Ct. at 158.

When jurisdiction is asserted over a foreign corporation because of its relationship with a local person or corporation, the nature and extent of this relationship, as well as the relevance of the subject-matter of the suit to defendant's affairs within the state are of significance. Defendant's dealers were not mere buyers, or outlets for its products, but, as we have indicated, were subject to its detailed supervision and control. Virtually indistinguishable franchises have been held sufficient to subject a foreign manufacturer or distributor to suit in the jurisdiction of its local dealer. Snyder *v.* Eastern Auto Distributors, Inc., supra; Delray Beach Aviation Corp. *v.* Mooney Aircraft, Inc., 5 Cir., 1964, 332 F.2d 135, cert. den. 379 U. S. 915, 85 S.Ct. 262, 13 L.Ed. 2d 185; Fiat Motor Co. *v.* Alabama Imported Cars, Inc., 1961, 110 U. S. App. D.C. 252, 292 F.2d 745, cert. den. 368 U. S. 898, 82 S.Ct. 175, 7 L.Ed. 2d 94. Although interlocking ties of corporate control, such as common directors and officers, may not in themselves be sufficient to subject the foreign cor-

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organized under the laws of foreign countries is circumscribed by the due process clause of the fifth amendment. Cf. United States *v.* Scophony Corp. of America, 1948, 333 U. S. 795, 818, 68 S.Ct. 855, 92 L.Ed. 1091; United States *v.* Imperial Chemical Industries, Ltd., S.D.N.Y., 1951, 100 F.Supp. 504, 511. In any event, in federal question cases, the courts have tested the amenability of any foreign corporation to suit by reference to the standards developed under that clause. Lone Star Package Car Co., Inc. *v.* Baltimore & O. R. R., 5 Cir., 1954, 212 F.2d 147; Ostow & Jacobs, Inc. *v.* Morgan-Jones, Inc., S.D.N.Y. 1959, 178 F.Supp. 150.

poration to local jurisdiction, Cannon Mfg. Co. *v.* Cudahy Packing Co., 1925, 267 U. S. 333, 45 S.Ct. 250, 69 L.Ed. 634, they are relevant factors, and lend support to jurisdiction based on this contractual reservation of control. Boryk *v.* deHavilland Aircraft Co., 2 Cir., 1965, 341 F.2d 666; cf. Fooshee *v.* Interstate Vending Co., D.Kan., 1964, 234 F.Supp. 44.

[4] When, as here, a foreign defendant's contacts with a forum are substantial, a suit may be maintained though it concern a matter having no connection with the forum. Perkins *v.* Benguet Consol. Mining Co., 1952, 342 U. S. 437, 72 S.Ct. 413, 96 L.Ed. 485. In the present case, moreover, the suit is not unrelated to Puerto Rico: throughout the period of the franchise, VWPR acted as agent for defendant in relation to its business with plaintiff. Cf. Fiat Motor Co. *v.* Alabama Imported Cars, Inc., supra.

[5] Defendant could not carry on substantial economic activities within this country and at the same time claim to be absent when distasteful consequences ensued. Defendant was subject to personal jurisdiction in Puerto Rico, and was properly served by service upon VWPR's managing agent. Fed.R.Civ.P. 4(d) (3); Lone Star Package Car Co. *v.* Baltimore & O.R.R., supra, note 3.

We come next to the question whether defendant is a party who can be sued under the Dealers' Act. Section 1222 provides only for "suit against any automobile manufacturer." Section 1221(a) states,

> "The term 'automobile manufacturer' shall mean any * * * business enterprise engaged in the manufacturing or assembling of [motor vehicles] * * *, including any person, partnership, or corporation

> which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles."

Defendant's position is that, although by section 1221(a) suit can be brought against a manufacturer for the misconduct of its distributor, the act does not authorize suit against the distributor itself. Defendant further contends that it was not a distributor acting for and under the control of a manufacturer.

[6, 7] We agree with defendant that the Dealers' Act is aimed at automobile manufacturers, not at distributors, as such, and that the inclusion of certain distributors in section 1221(a) was designed only to prevent a manufacturer from circumventing its responsibilities under the act by transacting business with its dealers through alter egos. We do not conclude from this, however, that when the manufacturer has acted through a distributor over whom it exercises the requisite control, suit cannot be brought against the distributor as well. It is basic agency law that an agent who has injured a third party cannot defend on the ground that he did so at the bidding of another. Indeed, if he so acts, he must do so subject to any special liability or disability that would attach to the principal for whom he is acting. It is entirely consistent with both the purpose and language of the act to hold that "automobile manufacturer" means, inter alia, "automobile distributor," when the distributor is subject to the manufacturer's control. Barney Motor Sales *v.* Cal. Sales, Inc., supra.

Defendant's assertions that this requisite relationship was lacking, and that the court erred in excluding evidence relating to control, are based upon a misconception of the appropriate standard. Defendant is doubtless correct in

suggesting that if the distributor is but an "instrumentality" of the manufacturer, in the special sense that the term is used in corporation law, this is a sufficient basis for bringing the distributor within the act. It is not, however, the only basis. "Acts for and is under the control of * * *" describes with equal aptness the relation between certain agents and their principals. A manufacturer can exercise the same kind of control through contractual provisions with a stranger as it can by owning and directing a subsidiary corporation, and evasion of its responsibilities by either method would equally undermine the purposes of the act. We believe the provision in question should be interpreted in the context of general agency law. It is sufficient that the distributor "is subject to the [manufacturer's] * * * control or right to control." Restatement (Second), Agency, §220(1); Reconstruction Finance Corp. *v.* Merryfield, 1 Cir., 1943, 134 F.2d 988, 991.

Under the terms of defendant's franchise from the automobile manufacturer, Volkswagen G.m.b.H., defendant was subject to the manufacturer's control in much the same way and to much the same extent as defendant's franchised dealers were subject to its control. Furthermore, the agreement obligated defendant to supervise and enforce its dealers' compliance with the manufacturer's regulations. It was not error to exclude defendant's proffered evidence as to the manufacturer's actual involvement with plaintiff's franchise. What matters is that it had the power.

Defendant next contends that the evidence does not support a verdict in plaintiff's favor on the merits. Before examining the record we must first inquire into the governing legal standards, which are not entirely clear from the face of the statute. Section 1222 requires the man-

ufacturer to "act in good faith * * * in terminating, canceling, or not renewing the franchise." Section 1221(e) defines "good faith" as

> "the duty of each party to any franchise * * * to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

For a manufacturer to condition continuation of a franchise upon certain conduct, even if characterizable as a threat, cannot constitute forbidden coercion per se. It must appear that the condition was unfair or inequitable. To hold otherwise would not only circumscribe the manufacturer's freedom to do business to an extent we cannot believe contemplated by Congress, but would lead to the absurd result that a manufacturer could not insist upon the very terms of the agreement.

Initially, we think there is an important difference between two kinds of improper conditions that a manufacturer might impose and back up by threats. Particularly suspect under the act are conditions which benefit only, or primarily, the manufacturer—for example, requirements that a dealer purchase large stocks of vehicles, spare parts, special tools or advertising matter—as distinguished from requirements that would tend to work to the mutual advantage of both parties, for example, that the dealer improve its service, or managerial efficiency. The manufacturer can easily extort demands of the first sort, increasing its own profit at the expense of the dealer's; the act's legislative history indicates that this was of particular concern to the Congress. The latter sort, even

if the demands may be thought excessive under the circumstances, should not, without more, indicate that the manufacturer is taking advantage of the dealer, or using the franchise as a weapon for extortion, since the manufacturer stands to profit from his demands only if the dealer profits as well.

The jury could have found that defendant imposed several requirements upon plaintiff which, under the above analysis, if improper, would fall into the first group—conditions directly benefiting the manufacturer, but not necessarily the dealer. Plaintiff's 1956 franchise required it to stock spare parts equal in cost to ten per cent of the value of its automobile stock; the 1958 franchise required him to purchase from defendant a welding machine, a line of Vespa motor scooters, a tractor, advertising materials, and tools; plaintiff was forced to sign the 1960 renewal contract without being given time to read its terms. Even if it be assumed that defendant acted unreasonably and coercively, not only did none of these events occur within the three-year statutory period before the action was commenced, 15 U.S.C. §1223, but there is no evidence that plaintiff's unfavorable reaction, but nonetheless acceptance of them, contributed to the subsequent termination or nonrenewal of his franchise. This latter was all the complaint sought.[4] Kotula v. Ford Motor Co., 8 Cir., 1964, 338 F.2d 732, 736.

The jury could have found, as defendant contended, that defendant's reason for terminating the franchise was that plaintiff failed to meet defendant's standards of service, sales, efficiency, and appearance. Reading the record most favorably to plaintiff, we believe the jury

4. Plaintiff's listing these alleged losses in his brief to justify the size of the verdict was, accordingly, improper.

could have found that the quality of his service was good; that his sales were adequate for the St. Croix area, and that any decline in sales during 1961 was due to circumstances beyond plaintiff's control; that the appearance of plaintiff's place of business, and its efficiency, were reasonable for that area; and that plaintiff's failure to meet various contractual commitments also were the result of events beyond his control. However, plaintiff's own evidence and admissions disclose that his performance could well have been better, and that it would not have been unreasonable for the manufacturer to conclude that, even if plaintiff's enterprise was not below par for the Virgin Islands, another, more enterprising dealer could overcome many of the difficulties encountered by the plaintiff, and better represent Volkswagen's interests in terms of service, sales and image.

As we have indicated, a disfranchised dealer does not make a case under the statute merely by proving that his performance was not below minimum limits. Plaintiff makes a special showing, however, intending to establish that it was not really his performance with which defendant was dissatisfied. In particular, plaintiff alleges that starting in 1960, defendant determined to take a direct share of the retail profits in the St. Croix area. Had defendant merely wished to own a dealership itself, it might have terminated plaintiff's franchise and formed its own enterprise. But plaintiff asserts that defendant wanted a direct share of the profits without making any, or any substantial, investment; that defendant threatened plaintiff with loss of the franchise unless he agreed to admit defendant to his operation; and that when plaintiff refused, defendant made good its threat. We turn to some of the relevant evidence.

In January 1961, defendant's manager and substantial stockholder, Hinke, proposed to two St. Croix real-estate brokers that a joint enterprise be formed in which defendant, plaintiff, and the brokers' group would each have a one-third interest. One of the brokers testified as to Hinke's proposal:

> "They were to participate financially and supposedly to give us service help. * * * He [Hinke[5]] would have one-third of it, but I don't believe he was going to put in money. We rejected the idea."

Plaintiff testified that Hinke put essentially the same offer to him:

> "[H]e made a proposition in which he wanted to set up a new business for the Volkswagen franchise and offered me ⅓ participation. These people would get ⅓ and Volkswagen would get ⅓. I asked concerning the capitalization and he said it was to be capitalized for $100,000 and I said to him, Mr. Hinke, the last statement we sent you showed that we had a business worth $230,000.00. How in the world could I invest this against the capitalization for ⅓ of the $100,000.00, I said this is untenable. He said, I can see how you think about it, but I think in the long run you would be much farther ahead. * * *"[6]

5. Throughout the record, Hinke and defendant are referred to interchangeably. The jury could have found that the interest was to be defendant's, and not Hinke's personally.

6. In view of plaintiff's restatement of Hinke's proposal in a letter of February 6, 1961, to Hinke, a jury could not have found that defendant proposed that all of the assets of plaintiff's present dealership were to be transferred to the new enterprise. In particular, the new dealership was to have a new building at a different site. The jury could have found, however, that defendant required that plaintiff invest $37,000 in addition to whatever part of its present investment would be transferred to the new enterprise.

Plaintiff rejected the offer at the time it was proposed, and Hinke left St. Croix. Immediately thereafter, Hinke wrote to plaintiff that defendant had decided "not to continue our relationship on the present basis, due to the fact that some of the essentials of the Volkswagen business in St. Croix have been overlooked. * * *" The jury could have found that when plaintiff came to Puerto Rico upon receipt of this letter, he threatened to go to Germany to complain of the treatment he was receiving from defendant, and that Hinke immediately changed his attitude and offered to, and for a short period did in fact, lend assistance to plaintiff. In January 1962, plaintiff opened up a new showroom, which, the jury could have found, was attractive in appearance and favorably displayed Volkswagen automobiles. On September 24, 1962 defendant wrote to plaintiff that all business relations between them had terminated for cause as of August 31, 1962.

To render a verdict in plaintiff's favor, the jury would have had not only to disbelieve contradictory testimony, but also to conclude that certain of defendant's conduct, superficially inconsistent with the motives plaintiff ascribes to defendant, was intentionally contrived to disguise defendant's true purposes. Some of defendant's conduct could lead a reasonable jury to that conclusion. For example, the jury might have found unconvincing and contrived Hinke's claim that he first came to St. Croix in the fall of 1960 because he was concerned with a "strong backward trend in the sales," in view of the fact that the sales up to his arrival in St. Croix were twice those of the previous year,[7] and that any decline in sales from the high point of the early months followed the usual seasonal

7. They were also substantially greater than 1957, and only slightly below the sales for 1958.

trend of the four years in which plaintiff had been in business. The jury might further have believed that other criticisms of the plaintiff's operation—for example, that his servicing was poor—were false, or exaggerated.

We could agree with defendant that discussions with other persons looking towards their taking over a franchise, are not only not inconsistent with a claim that the dealer's performance was inadequate, but would be only natural. The case at bar was unusual, however, in that the contemplated change-over was one in which the defendant would share. On Hinke's own testimony, this would have been "a negative situation * * * very much contrary to our doings. We feel always that we should not enter the retail field." The jury might well have found inadequately explained why, in the light of this protestation, defendant sought to establish a new dealership in which it was to participate.[8] The jury could well find that the initially threatened termination was not in good faith. With this as a background, we believe that on the record as a whole there was a jury question whether defendant's termination of the franchise related to the conduct of plaintiff's agency, or to his rejection of the defendant as a partner upon unreasonable terms. If the latter, it was a clear violation of the Dealers' Act.

Defendant next contends that the Dealers' Act "is unconstitutional both by virtue of its arbitrary distinctions unre-

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8. Defendant complains because plaintiff was permitted to introduce testimony, following Hinke's above-quoted statement on direct, that defendant, after unsuccessfully attempting to buy into the business of its Puerto Rico dealer, cancelled the franchise and substituted VWPR. Defendant may be correct that this incident would not be admissible to contradict Hinke's statement that defendant's "general policy" was not to terminate dealerships. But it was certainly admissible to rebut Hinke's claim that defendant had no interest in participating in plaintiff's business because it never entered the retail market.

lated to the public interest and because of the vagueness of the standard of conduct which it purports to legislate."

[8] Defendant cites no cases in support of its first argument and we doubt that it could find substantial support in any case decided within, at least, the last quarter century. The legislation was enacted in the context of committee findings of widespread abuse by automobile manufacturers of their franchised dealers. H.R.Rep. No. 2850, 84th Cong., 2d Sess. (1956); S.Rep. No. 2073, 84th Cong., 2d Sess. (1956), U.S.Code of Congressional and Administrative News 1956, p. 4596. It is clearly responsive to this problem, and not only gives protection to the approximately 40,000 franchised automobile dealers in the United States—a sufficient "public purpose" in itself—but could be found to redound to the ultimate benefit of the public at large. See 102 Cong.Rec. 4848, 7482 (1956).

[9-11] For its second point, defendant relies chiefly on General Motors Corp. *v.* Blevins, D.Colo., 1956, 144 F. Supp. 381, which struck down an analogous state statute. Although *Blevins* involved penal sanctions, and "the standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement," Winters *v.* People of State of New York, 1948, 333 U. S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840, we will not say that a civil statute could not be so vague as to offend the due process clause. Without expressing any view as to the correctness of *Blevins*, however, we think it is significantly different from the case at bar. The state legislation punished a manufacturer who "unfairly, without due regard to the equities of said dealer and without just provocation, cancelled the franchise of any motor vehicle dealer."

While the federal Dealers' Act imposes a requirement of "good faith," section 1221(e), as we discussed at some length above, narrows the meaning of that term to a considerable extent. It may be true that the statute in effect delegates some responsibility to the courts to refine and develop standards under the act on a case-by-case basis, but this is neither unusual nor unconstitutional. Cf. Textile Workers Union of America *v.* Lincoln Mills, 1957, 353 U. S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. Whatever might be said about the Dealers' Act if it subjected a manufacturer to criminal penalties, we hold that it is sufficiently clear to withstand a constitutional challenge of vagueness. Blenke Brothers Co. *v.* Ford Motor Co., N.D. Ind., 1962, 203 F.Supp. 670.

[12] Defendant raises a number of less fundamental questions, all of which we have considered, but only one of which merits comment. This relates to the alleged prejudicial behavior of the trial court. Review of the record reveals nothing of any possible moment, except for some occasional sharp remarks to defendant's counsel. The reason, and justification, for these remarks, however, is quite apparent. It is inappropriate for counsel to complain of treatment he has invited, particularly when that treatment is well within responsive limits. We have said before, and we repeat, such claims should not be made at all unless they are very sound. The proposition that counsel can disregard the court's instructions, obtain a rebuke, and then preserve the incident as insurance in the event the case is lost, does not sit well.

[13] There remains the matter of damages. Perhaps the best introduction to the subject is to mention two of the more extraordinary of the arguments made in this court. Defendant contends that the plaintiff's income tax

return should not be considered because it was introduced *"by the defendant"* (ital. in orig.), and would not have been competent if offered by the plaintiff. It is true that this, and some other evidence in fact favorable to the plaintiff, was introduced by the defendant, but it is a novel concept that evidence is available only to the party who introduces it. Plaintiff evens the score, however, by arguing that possible errors in the court's charge as to certain items of damages need not be noticed because the jury might have reached the equivalent monetary result by some other route. This argument is not quite so original, but no better. Neither it, nor any other argument can overcome the court's error in permitting the jury to find that if plaintiff had received the last 117 cars he had ordered (for only 25 of which he had firm orders from customers), his profit on all 117 would have been the same as the gross mark-up. Manifestly there would have been some expense, even if all had ultimately been sold. It was likewise error, particularly when defendant had expressly offered to take useless parts and inventory off plaintiff's hands, for the court to refuse to charge on plaintiff's duty to mitigate the damages which plaintiff claimed for being left with this material.

These were substantial errors. The court also erred in charging the jury that the contract had never been terminated. The basic agreement may have been automatically renewed in 1961 and 1962, but defendant's unequivocal letter of September 24, 1962 clearly operated to terminate the franchise.

Whether defendant adequately saved its rights with respect to certain other damage matters we need not determine. Since we hold there must be a new trial on this issue, we will consider them in any event. We think

the court was exceptionally liberal in permitting the plaintiff to testify to figures concerning his profits and the value of the franchise off the top of his head, without reference to books and records. Possibly the defendant's only remedy was cross-examination. Possibly, too, before another trial, the defendant will want to take plaintiff's deposition in St. Croix where the records are. Second, we find most unrealistic plaintiff's self-evaluation of his franchise on a 6% basis in his brief before us, so that an income of $18,000 made it worth $300,000.[9] This was surely impermissible when $18,000 was plaintiff's best year, and in the next he lost $12,000. As we look at the record as a whole, more evidence, and a detailed explanatory charge, should have been required on any franchise valuation claim.

[14, 15] Finally, we find no basis in the Dealers' Act for allowing plaintiff to recover damages for injury to his reputation caused by the termination. The parties have given us no assistance here, but we think a close analogy can be found in the rule that such damages cannot be recovered for breach of an employment contract. Mastoras *v.* Chicago, M. & St. P. Ry., W.D.Wash. 1914, 217 F. 153; Sinclair *v.* Positype Corp. of America, 1933, 237 App. Div. 525, 261 N.Y.S. 900. Plaintiff should not have been allowed to claim that the mere termination of his dealership was a personal reflection.

Judgment will be entered vacating the judgment of the District Court and the verdict of the jury insofar as it made an assessment of the damages. The finding of liability will stand and a new trial ordered on the issue of damages.

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9. An even more pretentious argument was made to the jury.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6634.

VOLKSWAGEN INTERAMERICANA, S.A.,
Defendant, Appellant,

v.

HENRY ROHLSEN, d/b/a Rohlsen Sales Company,
Plaintiff, Appellee.

JUDGMENT

May 17, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the verdict is set aside as to the assessment of damages. The finding of liability will stand and the case is remanded for a new trial on the issue of damages. No costs on appeal.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Falls and Marsh.]